US Army Corps of Engineers

WOTUS Key Q&As

Q: What effect does this final rule have on the 2015 Rule?
This final rule repeals the 2015 Rule and recodifies the regulatory text defining "waters of the United States" that existed prior to the 2015 Rule. Due to preliminary injunctions issued by multiple federal district courts against the rule, the 2015 Rule currently applies in 22 states, the District of Columbia, and the U.S. Territories while the pre-2015 regulations are in effect in more than half of the States. By repealing the 2015 Rule and recodifying the pre-existing regulations nationwide, this final rule will alleviate inconsistencies, confusion, and uncertainty arising from the agencies' application of two different regulatory regimes across the country. The agencies will implement the pre-2015 regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

The agencies are currently engaged in a separate, but related rulemaking to revise the definition of "waters of the United States." With this final rule, the regulations that existed prior to the 2015 Rule will remain in effect during that separate ongoing rulemaking action.

Q: Clean water is important for our economy, and for public health and the environment. Does pre-2015 practice adequately and clearly protect our waters?

A: The agencies are returning to a regulatory definition that has been in place for more than 30 years and associated implementing guidance that the agencies have used for over a decade. Though reinstating the longstanding and familiar pre-2015 Rule will provide greater regulatory certainty, the agencies also recognize that the pre-existing regulations pose certain implementation difficulties and thus are proceeding with the agencies' two-step rulemaking process.

Q: What is the basis for repealing the 2015 Rule?

A: The agencies are repealing the 2015 Rule for four primary reasons.

- First, the agencies conclude that the 2015 Rule exceeded the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*.
- Second, the agencies conclude that the 2015 Rule did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b) to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution and to plan the development and use of their land and water resources.
- Third, the agencies are repealing the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional state land-use planning authority.

- Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

Q: Why is this action necessary? Why now?

A: As a result of litigation over the 2015 Rule, the rule applies in 22 states, the District of Columbia and the U.S. Territories, while the pre-existing regulations apply in 27 states, with New Mexico awaiting court clarification. The EPA and the Army took this action to provide regulatory certainty and to eliminate this ongoing patchwork of regulation pending the agencies' separate rulemaking on a proposed revised definition of "waters of the United States." This action will maintain a longstanding regulatory framework that is more familiar to and better-understood by the agencies, states, tribes, local governments, regulated entities, and the public while the agencies consider public comments on the proposed revised definition of "waters of the United States." With this action, the agencies are also remedying the procedural defects underlying the 2015 Rule and certain substantive deficiencies recently identified by U.S. District Courts for the Southern District of Texas and the Southern District of Georgia.

Q: What is the change in jurisdiction compared to the 2015 Rule?

A: The agencies are not aware of any datasets that fully depict the jurisdictional extent of waters under the 2015 Rule or pre-2015 practice. As a result, the agencies are unable to quantify the potential change in federal CWA jurisdiction due to the final rule. However, the agencies do recognize that there will be an overall reduction in the scope of federal CWA jurisdiction under this final rule compared to the 2015 Rule. For example, under the 2015 Rule all ephemeral streams meeting that rule's "tributary" definition were categorically jurisdictional; under the regime the agencies are restoring, the agencies will have to conduct a case-specific significant nexus test of such features before determining their jurisdictional status. Some of those features will be found to lack a significant nexus and will not be jurisdictional under the pre-2015 Rule regulatory regime.

Q: Some environmental groups claim this is a significant rollback in the stream miles protected under the Clean Water Act. Is this true?

A: There is no existing map of jurisdictional water under the CWA under any regulatory definition of "waters of the United States"; therefore, any quantitative estimate of a change of stream miles is fraught with uncertainty. The agencies note that in both the Step 1 and Step 2 economic analyses, the agencies are taking into consideration existing state programs regulating waters that would no longer be jurisdictional under the 2015 Rule or under the proposed Step 2 rule. By better reflecting the important roles that states play in managing their water resources, the agencies' analyses predict less of a reduction in regulation of waters than is claimed by certain environmental groups and others opposed to these rulemakings. It should also be noted that many environmental groups submitted comments during this rulemaking that stated the 2015 Rule did not expand jurisdiction. While the environmental organizations have conveniently changed positions on this issue, this administration's position has remained constant: the 2015 Rule unlawfully expanded jurisdiction.

Q: What are the costs and benefits for this rule?

A: The agencies conducted an economic analysis for the final rule that updates the 2015 Rule analysis and builds on the economic analysis for the proposed rule to revise the definition of "waters of the United States." The agencies developed several scenarios to estimate avoided costs and forgone benefits to reflect assumptions about how states may already be regulating waters that would no longer be subject to the federal Clean Water Act jurisdiction following this final rule. Under the scenario that assumes the fewest number of states regulating newly non-jurisdictional waters, the agencies estimate the final rule would produce annual avoided costs ranging between $116 and $174 million and annual forgone benefits ranging between $69 to $79 million. When assuming the greatest number of states are already regulating newly non-jurisdictional waters, the agencies estimate there would be annual avoided costs ranging from $61 to $104 million and annual forgone benefits are estimated to be approximately $37 to $39 million.

Q: Are the agencies going to finalize the proposed Step 2 rule?

A: The comment period for the proposed Step 2 rule closed on April 15, 2019. The agencies are currently reviewing approximately 620,000 comments received from the public on the proposed rule and will carefully consider them before taking final action.

Q: When will this action take effect?

A: The action will be effective 60 days after publication in the *Federal Register*.